UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ANU UPADHYAY,

Plaintiff,

v. 10 Civ. 8462 (NRB)

NEERAJ SETHI, et al.,

Argument

Defendants.

----------x

New York, N.Y.
January 18, 2012
10:15 a.m.

Before:

HON. NAOMI REICE BUCHWALD

District Judge

APPEARANCES

GLADSTEIN REIF & MEGINNISS LLP
Attorneys for Plaintiffs
BY: JAMES REIF
AMELIA TUMINARO

PROSKAUER ROSE LLP
Attorneys for Defendants
BY: JOSHUA ALLOY

(Case called)

THE COURT: Good morning.

THE CLERK: Is the plaintiff present and ready to proceed?

MS. TUMINARO: Gladstein Reif & Meginniss by Amelia K. Tuminaro.

MR. ALLOY: Josh Alloy, Proskauer Rose, for the defendants.

MS. TUMINARO: Your Honor, if I may mention, the plaintiff is here. We have an interpreter to provide a summary of the arguments, if that is OK with the Court.

THE COURT: Sure.

MS. TUMINARO: There will be a little bit of talking, but they will try and keep it as quiet as possible.

THE COURT: That's fine.

I think everyone recognizes that there are essentially two aspects of this motion. One is the question of whether the performance of massages takes the plaintiff outside the scope of household employee, an issue that I think everyone recognizes is one governed by statute, case law, etc. I don't think it would be valuable for us to spend any time discussing that. We have looked at it and have reached our own views about it.

With respect to the equitable tolling issue, let's put the merits to one side for a minute and begin by discussing the

procedural question. The defendants take the position that if I'm not prepared to grant their motion based on the papers, I should hold a hearing. The plaintiff, I think, takes the position that the Court should not hold a hearing, because there is an overlap between ultimate merit issues and issues that in the plaintiff's view need to be decided in the context of a resolution of the equitable tolling issue.

I would appreciate it, Ms. Tuminaro, if you were to explain to me the issues that you think I would need to decide in the context of a hearing on the equitable tolling argument that would overlap the merits. Let's leave it at that.

MS. TUMINARO: Yes, your Honor. As a preliminary matter before we address the specific issues that the Court would need to decide, plaintiff is entitled to discovery on the issues surrounding whether the statute of limitations should be tolled here. We haven't had discovery. We have had some informal disclosures, but we haven't had official document requests, we haven't had any interrogatories or depositions. In that respect plaintiff has not been able to fully develop a record.

Insofar as the issues need to be decided --

THE COURT: Let's hold that for a minute. I'm going to then ask you exactly what is it, given the exchange of affidavits that you both engaged in, which are pretty detailed, you need to have discovery on in terms of the equitable

tolling. Let's hold that. I don't want to lose that.

What exactly are the overlapping issues, things that you say the Court would have to resolve?

MS. TUMINARO: Before I get there as well, we also submit that plaintiff has a right to a jury trial on these issues.

THE COURT: She has a right to a jury trial on the ultimate merit issues. The reason I'm asking you to answer the question I that I posed is because the law is well established that when there is an issue of the jurisdiction of the court, unless the issue is inseparable from the merits, the court decides the jurisdictional issue. You know it and I know it, we do not routinely have statute of limitations issues decided by juries. Courts decide estoppel issues, they decide statute of limitations issues, they decide all sorts of jurisdictional issues.

So, the issue is there is a problem if, in order to decide the equitable tolling issue, I absolutely have to go, in a sense, into the merits. But I'm not sure that I do, so I need you to tell me why you think I do.

MS. TUMINARO: Your Honor, if I may respond. We disagree that this is for the Court to decide. The Second Circuit has a number of cases where they have stated that where the statute of limitations operates as an affirmative defense and where there are material issues of fact surrounding the

application of the statute of limitations, that factual issues are for resolution by a jury.

THE COURT: You and I are going to have to disagree about that. There are plenty of other cases which, as I say, make it clear that the broad principle that if the jurisdictional issue overlaps the merits and the court would have to be deciding a merit-based issue on which a party was entitled to a jury on the preliminary issue, then there is a problem.

But it may not be the case that there is an overlap of merit and statute of limitations, so I need you to tell me what specific issues you're suggesting I would need to reach that would impinge upon the plaintiff's jury trial.

MS. TUMINARO: To set it aside and move forward, the case I would direct you to in terms of this question about whether or not there is a disputed issue that goes to the jury on the statute of limitations is Katz v. Goodyear Tire, where the Second Circuit addresses this question in the context of being a jurisdictional issue. It says the statute of limitations, when it operates as an affirmative defense, issues of fact as to the application of that defense must be submitted to the jury. There is a discussion in there about the distinction between jurisdictional --

THE COURT: Excuse me. You have the burden of proof. This is not the defendant raising an affirmative defense. This

is your problem.

MS. TUMINARO: In terms of the overlap, there are a number of factual issues that the Court would need to determine as to whether the statute should be tolled. As an initial matter, as we mentioned in our brief, the employer has an obligation to post a notice advising of employees' rights under the Fair Labor Standards Act and the relevant state statutes. Plaintiff has put forward evidence that they didn't do that here. That is undisputed. But the defendants have maintained that they orally translated these notices. Plaintiff denies this. That would be one issue.

THE COURT: Why is that a merits issue?

MS. TUMINARO: It goes to whether or not there was a willful violation of the Fair Labor Standards Act.

THE COURT: I honestly think that in light of Mr. Sethi's affidavit in this case, paragraph 3, there is no issue here. If the Sethis initially did not pay the plaintiff proper wages, it was willful. He has said, I am familiar with this law. What is the issue? What is the willfulness issue?

You're not going to have many defendants who say, I am fully familiar with the law, I do it for my job. Therefore, if he did not comply with the law, it was willful, willful in an intentional, knowing way. I don't think willfulness is really an issue.

MS. TUMINARO: I don't know what the defendants'

position is going to be on that. They dispute that they didn't pay her these wages.

THE COURT: That's the merits. I agree with you totally I shouldn't, cannot, and will not find in the context of any hearing or resolution of this equitable tolling issue how much money the defendants paid the plaintiff, nor will I ever make a finding that plaintiff was entitled to X and she was either paid X minus Y or X plus Y. That's the merits.

MS. TUMINARO: There is a liquidated damages issue that also is present that would go to the merits issue, and plaintiff's entitlement to damages here would be one that the willfulness would bear on as well.

THE COURT: It seems to me that as to willfulness, it would be very hard, indeed I think impossible, for the defendant Mr. Sethi to argue that he was not fully aware of the law. If he did not comply with it, that is a deliberate, intentional/willful act. It's not a mistake. I don't really see how willfulness is an issue here.

MS. TUMINARO: There is factual and legal overlap between some of the facts plaintiff and defendants are disputing here. Some of those go to whether or not there was any violation at all of these various requirements, as well as to the factual disputes as to when plaintiff became aware of her rights or whether she was aware of her rights. These would all be issues that the Court would need to decide if the Court

were to conduct such an evidentiary hearing.

THE COURT: Right. But when she became aware of her rights is a statute of limitations issue, not a merits issue. If you're right and there was equitable tolling here, the case becomes just how many years, and it's math. There is no drama anymore. It just goes back all the way. That's what your argument is, that there is no applicable statute of limitations, and then we explore the exact facts, what did she get, was it sufficient to comply with the law, was it insufficient to comply with the law.

MS. TUMINARO: There is also a concealment issue here in terms of the defendants' concealment of the wages paid to the plaintiff by virtue of their control over the bank account.

THE COURT: Why is that not an estoppel issue rather than a merits issue? The facts as to what she got or didn't get is the merits. Whether they lied to her or not is an estoppel issue.

MS. TUMINARO: These questions of whether a plaintiff exercised diligence or whether defendants affirmatively concealed information from the plaintiff are factual issues, that the Second Circuit has said --

THE COURT: I'm not saying --

MS. TUMINARO: -- are factual issues that, where they serve to toll the limitations period, must be decided by a jury.

THE COURT: Play with me. I disagree with you about that.

MS. TUMINARO: OK.

THE COURT: Now we're in my world. My world says I can decide that. What I'm trying to ask you is assume I'm right for the purpose of this discussion that I can decide factual issues related to knowledge, concealment, all the elements, whether the defendants in any way prevented the plaintiff from bringing the suit earlier, all the elements of equitable estoppel.

Having now in my view essentially put willfulness off the table, are there other factual issues that I would have to decide in the context of equitable estoppel that would fall over into the merits issues in a way that if I decided them in the context of a hearing would impinge on the plaintiff's jury trial?

MS. TUMINARO: I don't believe there are. That's our essential argument.

THE COURT: Mr. Alloy, what is your take on what I just said?

MR. ALLOY: I agree. I think there are two essential factual issues to the merits: How many hours the plaintiff worked, whether she actually worked more than 40 to 44 hours in a week, how much she was paid, and whether that violates the minimum wage or overtime or doesn't. I don't see any overlap

with the equitable tolling issue, whether something was posted or maintained or whether there was concealment.

As you point out, the willful violation, if there was a true overlap between willfulness and equitable tolling, we would see equitable tolling a lot more often. In fact, we see willfulness is pretty much a de facto finding if there is a violation in this circuit.

There doesn't tend to be that much factual issues involved in willfulness absent very sort of significant good faith attempts by the defendants to comply with the law, which is very different from the type of fraudulent concealment and other factual disputes. Frankly, we don't necessarily agree that there are true factual disputes when you look at what is actually plausible. But I think that is another issue.

All that is a way of saying no, I don't see any overlap between the two.

MS. TUMINARO: Are the defendants prepared to stipulate that if there is a violation, the violation was willful?

MR. ALLOY: No.

THE COURT: Remember, logically, unless there is equitable tolling, I don't think that the plaintiff has a timely claim against Dr. Sethi, the husband.

MS. TUMINARO: That's not accurate actually, your Honor. Under New York law the statute goes back --

THE COURT: I'm only worried about federal law.

MR. ALLOY: I think that's right. If equitable tolling does not apply, I think there are serious questions about this Court's subject matter jurisdiction. I also think there are serious questions about any viable claims against two of the defendants. That would leave the two doctors, Sethi and Raj, who don't live in this state and aren't residents of this state, and they have no state law claims.

THE COURT: Tell me if I'm wrong in my memory of the facts. This case was filed in November of 2010. If you go back three years, which is the assumption for willfulness, you would go back to November 2007. My understanding is that the plaintiff did not work for the doctors within that period of time. That is my point, that they are really sort of outside this whole willfulness discussion. The willfulness only has a role if there is equitable tolling, and the role has nothing to do with statute of limitations, it has to do with damages.

We put to one side earlier this discovery point that you wanted to raise. Let's assume for our discussion that I'm going to follow through on the notion of having a hearing just on the equitable tolling issue. What discovery is it that you're suggesting, Ms. Tuminaro, is necessary, focusing just on the equitable tolling issue?

MS. TUMINARO: Your Honor, plaintiff hasn't had any formal discovery, so we would want to submit interrogatories

and document requests and have depositions. Defendants made various claims in their affidavits about we advised the plaintiff of her rights as to this, we explained these kinds of things. They are conclusory statements that don't mention with any specificity the date that these oral translations allegedly took place, who was there, what notices were translated. There is a whole scope of information that we would want to explore based on the affidavits.

THE COURT: I would assume that they would say, in all candor we cannot tell you the exact date. If they would tell you a date, I would probably not believe them. How would hashing all of this out through depositions be more useful than having a hearing at which you cross-examine everybody based on these affidavits?

MS. TUMINARO: It would be useful in the sense that having discovery prior to cross-examination is always useful because you can then get at what the facts are, you can ask your own questions, you can explore certain things that weren't mentioned in the affidavits. It's for all the reasons that Rule 26 provides discovery to plaintiffs.

THE COURT: Since one of the concerns here is following rule one that we should be concerned about, cost and efficiency, how do we serve those functions? Is there a way to control discovery to be limited to the specific issues, or in reality would we wind up with full-fledged discovery on

everything because it would be maybe even more inefficient to try to divide it?

MS. TUMINARO: If it were to be confined at this point to issues around equitable tolling, say hypothetically the Court eventually agrees with us that the statute should be tolled, then you have a second wave of discovery, which is necessarily going to have some overlap. It would seem that that would be duplicative and inefficient.

THE COURT: If I agreed with you, then it all becomes math, right? Isn't it just math at the end?

MS. TUMINARO: I think there are going to be significant factual disputes given that some of the records are unavailable based on how far it goes back.

THE COURT: I don't mean undisputed math. I just mean it's numbers. It may be more complicated in figuring out.

MS. TUMINARO: There are going to be disputes about how often she did certain kinds of work. There are going to be disputes about how many hours she worked and during what periods of time. It's not just math.

MR. ALLOY: If I may, your Honor?

THE COURT: Yes.

MR. ALLOY: Here is my big concern with a allowing plaintiffs sort of unfettered or even focused discovery. The FLSA, as plaintiff's counsel is well aware, allows for attorney's fees for a successful plaintiff. So all of the

costs associated with this are basically going to be borne by defendant.

If plaintiffs are successful, they will recoup all of their costs. If they are unsuccessful, we have now gone through an entire what we view as a superfluous discovery process at no cost to plaintiffs, at great cost to defendants, even though I think some courts have begun to allow costs and attorney's fees to prevailing defendants, particularly in the Eleventh Circuit.

I would suggest if plaintiffs are going to insist on some sort of discovery, which I don't quite understand what is needed beyond cross-examination at a hearing given the affidavits, if plaintiffs are willing to bear defendants' full attorney's fees and costs if they are unsuccessful, we would consider some sort of limited discovery. Beyond that, I view it as completely inequitable and unnecessary endeavor.

We have spent over a year now trying to resolve this informally specifically to avoid some of the costs and burdens of discovery. If they are going to want to depose two doctors who worked in Texas and the other two defendants are in New Jersey, these are enormous costs and burdens to them on an issue that we ultimately feel very strongly has no merit.

We would ask for some protection if we are correct that equitable tolling doesn't apply and essentially plaintiff has no claims other than state law minimum wage and overtime

claims against two out-of-state defendants.

I can certainly forward the recent decisions from the Eleventh Circuit that have awarded attorney's fees to a prevailing defendant. I think this is a case where equity is a major issue.

MS. TUMINARO: Your Honor, I just don't understand here why the courthouse door seems to be closed to plaintiff and she can't be treated like every other plaintiff who is allowed to go through the discovery process. Normally, if you file an action, you go through your disclosures and then you proceed through discovery. That has effectively been foreclosed for plaintiff in this case.

The Court has put her through this informal discovery process, which we have done. But here it is, the case is more than a year old and nothing has really happened. Plaintiff hasn't been able to take depositions. Instead, we have had to rely entirely on Defendants' own self-serving affidavits that they draft presumably with their counsel, and they put in the little tidbits of fact --

THE COURT: I wouldn't make that argument. After all, who wrote your client's affidavit? You did.

MS. TUMINARO: The point is that plaintiff hasn't been allowed to have discovery here. It seems inequitable here, where someone actually manages to get an attorney to file an action, to try and seek back wages, that the Court is

foreclosing the normal Federal Rules of Civil Procedure to her case.

THE COURT: I find that really offensive.

MS. TUMINARO: Your Honor, I didn't mean to offend you.

THE COURT: You have. An effort by a court to help people resolve a case without spending a great deal of money is considered laudable, not a deprivation of their rights. I'm sorry that that's the way you view it, but that was not the intent.

I thought the complaint of counsel is generally how expensive litigation is, but I guess you don't care if you prevail and the defendant will pay for your bills. I appreciate that. That's a little bit of a problem, because there is actually no remedy for defendant in this case. If this is a baseless case, what are they going to do? Get fees from someone who engages in household help? What type of money does she have? And if it doesn't rise to the level of Rule 11, where they can actually get the fees from counsel? Fee shifting is a good thing, but it's a problem, too. It cuts in two different ways.

I appreciate that it's written into the laws to provide protections for people that might not otherwise be in a good position to protect themselves. That's good if their cases are ultimately meritorious. But it can be an issue if

their cases are not so meritorious.

I think, Mr. Alloy, the problem is that there are direct contradictions in these affidavits. There really is no way, no mechanism, for any court to resolve contradictory affidavits just by saying I believe one side and I don't believe the other. It is, of course, not the case that a court can ultimately, in the context of summary judgment or otherwise, make a decision that says no reasonable jury could believe one side or the other. But I think you need more of a record than contradictory affidavits.

Before I tell you what my intentions are, is there anything else either of you would like to say at this point?

MR. ALLOY: No.

THE COURT: What I'm going to do is I'm going to give you a decision in writing. We will address the issue of household employee status. We will address the question of how we proceed from here, the issue of whether it is appropriate to resolve this at a hearing, and if so, what discovery is appropriate, if any, before that hearing. We should probably have something to you within a few weeks.

MS. TUMINARO: Thank you, your Honor.

MR. ALLOY: Thank you, your Honor.

THE COURT: Thank you.

(Adjourned)